

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT KNOXVILLE  
April 24, 2007 Session

**CHARLES DEWAYNE MOORE v. STATE OF TENNESSEE**  
**Appeal from the Criminal Court for Roane County**  
**No. 13400 E. Eugene Eblen, Judge**

---

**No. E2006-02261-CCA-R3-PC - Filed July 2, 2007**

---

In June 2003, a Roane County grand jury indicted the petitioner, Charles Dewayne Moore, on one count of first degree felony murder. On March 16, 2005, the petitioner pled guilty in Roane County Criminal Court to voluntary manslaughter and was sentenced to twelve years in prison as a Range III, persistent offender. On March 15, 2006, the petitioner filed a pro se petition for post-conviction relief. In his petition, the petitioner alleged that his guilty plea was involuntary and unknowing, and that he received ineffective assistance of counsel. On September 25, 2006, following the appointment of counsel,<sup>1</sup> a hearing was held on the defendant's petition, and the trial court denied the petition. The petitioner appeals the trial court's ruling. After reviewing the record, we affirm the judgment of the trial court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court**  
**Affirmed**

D. KELLY THOMAS, JR., J., delivered the opinion of the court, in which JERRY L. SMITH and NORMA MCGEE OGLE, JJ., joined.

F. Chris Cawood, Kingston, Tennessee, for the appellant, Charles Dewayne Moore.

Robert E. Cooper, Jr., Attorney General and Reporter; Rachel West Harmon, Assistant Attorney General; Russell Johnson, District Attorney General; Bill Reedy, Assistant District Attorney General, for the appellee, State of Tennessee.

---

<sup>1</sup>The record does not appear to indicate that the post-conviction attorney filed an amended petition. The Post-Conviction Procedure Act provides that within thirty days of being appointed, the petitioner's attorney must file either an amended petition or a notice indicating that no amended petition will be filed. This notice must indicate that the appointed attorney consulted with the petitioner and that both petitioner and attorney agreed that no amended petition need be filed. See Tenn. Code Ann. § 40-30-107(2) (2006). It is unclear whether such a notice was filed in this case.

## OPINION

In March 2002, the petitioner was charged with especially aggravated robbery following an alleged altercation between the petitioner and his uncle, William Guy, with whom he lived. The state alleged that during this altercation, the petitioner hit his uncle in the head with a chunk of concrete and stole money from him. On April 15, 2002, the petitioner pled guilty in Roane County General Sessions Court to criminal trespassing and was sentenced to eleven months and twenty-nine days in jail. Two months later, a Roane County grand jury indicted the petitioner on one count of especially aggravated robbery. However, on November 18, 2002, this indictment was dismissed on double jeopardy grounds.

Mr. Guy died on December 26, 2002, nearly ten months after the original altercation. The state, believing that the injuries Mr. Guy received in the altercation with his nephew caused his death, charged the appellant with felony murder. A Roane County grand jury indicted the petitioner on this count on June 17, 2003. The petitioner was represented by the Public Defender's office until a conflict of interest developed; on April 8, 2004, in light of the conflict, the trial judge appointed trial counsel to represent the petitioner.

At the post-conviction hearing, counsel testified that he likely first met with the petitioner during April 2004 because as a general rule, he meets with appointed clients within thirty days of appointment. Counsel noted that during the initial part of his representation, he was concerned that the petitioner had spent a substantial amount of time in jail; therefore, counsel, the petitioner, and his family worked on securing a bond reduction, despite the fact that counsel would be unable to bill his time for that work because, in counsel's words, "I wasn't hired by the Court to do a bond reduction hearing for him."<sup>2</sup> A review of the record indicates that counsel billed 81.8 hours during his representation of the petitioner.

Counsel testified that during the case, he focused on two main issues. The first issue was the cause and manner of the victim's death. The death certificate, which is included in the record, indicates that the victim's immediate cause of death was pulmonary hemorrhage. The underlying causes of death were aspiration pneumonia, severe gastroesophageal reflux, and multiple cysts of the pancreas, with closed head trauma and respiratory insufficiency listed as other significant conditions contributing to the victim's death. The manner of death is listed as "natural." In light of the death certificate, counsel testified that he had examined whether intervening medical negligence could be used as a defense. Regarding his research on intervening causes, counsel said he was unsure whether he would have been required to prove simple negligence or gross negligence on the part of the victim's medical providers. Counsel testified that he did not talk to the victim's attending physician, but he did speak to the victim's supervising nurse at his nursing home and reviewed the

---

<sup>2</sup>Despite counsel's statement, neither Rule 13 of the Tennessee Supreme Court nor the regulations of the Administrative Office of the Courts prohibit appointed trial counsel from billing the court for work done in connection with counsel's seeking a bond reduction for the client.

victim's medical records. Counsel testified that in light of the medical information, he concluded that "the problem that [the victim] had with swallowing food was directly attributable to the blow to the head." Despite this conclusion, counsel testified that had the case gone to trial, he would have questioned the victim's medical professionals extensively about the victim's treatment and cause of death.

The other main issue counsel examined was double jeopardy. Counsel researched whether the state could use robbery as the underlying felony in its felony murder prosecution when the defendant's previous especially aggravated robbery indictment had been dismissed on double jeopardy grounds. The attorney's main concern was that criminal trespass, the offense to which the petitioner pled guilty in 2002, "doesn't have any of the elements as an aggravated robbery or an aggravated assault. So the concern I had was whether or not double jeopardy would attach." Despite his concerns, counsel filed a motion to dismiss the felony murder indictment based on double jeopardy grounds; counsel insisted that "[i]f I hadn't done that[,] I'm certain that would have been cause for malpractice." Counsel also testified that in filing the motion to dismiss, he hoped to get the state to offer the petitioner a plea deal.

The hearing on the motion to dismiss was set for Monday, March 14, 2005. On Friday, March 11, the state faxed counsel a plea deal. Under the terms of the deal, the defendant would plead guilty to voluntary manslaughter and agree to be sentenced as a Range III, persistent offender. The state would recommend that the defendant serve twelve years, meaning that the petitioner would be eligible for parole in 5.4 years. The petitioner would receive pretrial jail credits for all time served, and the state would recommend that the petitioner's pending sentence on an unrelated theft charge would run concurrently with the manslaughter sentence. The state's offer concluded: "This is our best and final offer. The deadline for acceptance is 3:00 p.m. today. After that time the offer is withdrawn. We have out of state professional witnesses who have to be considered."

Counsel testified that after receiving the deal, he went to the Roane County Jail to discuss the deal with the petitioner. Counsel claims that he explained to his client that he could not guarantee success on the motion to dismiss or an acquittal at trial, and that if convicted, the petitioner could spend up to fifty-one years in prison, meaning he would likely die while incarcerated. On the other hand, counsel explained, if the petitioner took the deal, he would have a twelve-year sentence that guaranteed him eligibility for parole before serving six years. Counsel also told his client that with credit for time served, the petitioner could be released "within two or three years of this plea." According to counsel, the petitioner told his attorney that he would accept the deal, saying, "make this happen; I need to be out of this jail."

The petitioner testified that he met with counsel "[a]bout five times" during the eleven months counsel was his attorney of record. The petitioner claimed that he did not discover counsel was his attorney until he contacted the courthouse, and that he did not meet counsel until six months into counsel's representation of him. The petitioner also testified that counsel never subpoenaed any witnesses on his behalf, did not show him the death certificate or the record of death, and did not investigate the issues regarding double jeopardy and the victim's cause of death.

Regarding the plea deal, the petitioner testified that when counsel visited him on March 11, the first words out of the attorney's mouth were "take this or you'll end up doing life before the week's out." According to the petitioner, counsel said that he had spoken to the judge, and there was "no way" the judge would dismiss the indictment on double jeopardy grounds. The petitioner also claims that counsel told him that there was "no way" that the petitioner would win at trial. The petitioner claims that he then asked to speak to his family or his former attorney, Walter Johnson, but counsel refused. The petitioner claimed counsel told him "there's not much to weigh here; you're facing life or 12 years at 45 percent." The petitioner testified that counsel's actions made him believe that he had no choice in deciding whether to take the deal.

On cross-examination, the petitioner testified that he had a sixth-grade education. The petitioner testified that he often had to have counsel break things down and explain them to him because he was not an attorney. When asked why he did not voice any concerns regarding his attorney or the plea deal at the plea hearing, the petitioner claims that counsel told him not to speak and only answer the questions the judge asked him. Regarding counsel's testimony, the petitioner replied, "[n]ot to call a man a liar, but what a lot of what he said on this stand . . . was straight out wrong." The petitioner said that he did complain about counsel and the plea deal to the "captain of the jail," but this person did not testify at the post-conviction hearing.

#### STANDARD OF REVIEW: POST-CONVICTION PROCEEDINGS

The burden in a post-conviction proceeding is on the petitioner to prove his grounds for relief by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f) (2006). On appeal, we are bound by the trial court's findings of fact unless we conclude that the evidence in the record preponderates against those findings. Fields v. State, 40 S.W.3d 450, 456 (Tenn. 2001). Because they relate to mixed questions of law and fact, the petitioner's claims are reviewed under a de novo standard with no presumption of correctness. Id. at 457.

#### INEFFECTIVE ASSISTANCE OF COUNSEL

The petitioner contends that he received ineffective assistance of counsel. He claims he is entitled to relief because counsel (1) failed to litigate a motion to dismiss the felony murder indictment based on double jeopardy grounds, (2) failed to investigate the cause and manner of the victim's death, and (3) failed to consult with him adequately.

Under the Sixth Amendment to the United States Constitution, when a claim of ineffective assistance of counsel is made, the burden is on the petitioner to show (1) that counsel's performance was deficient and (2) that the deficiency was prejudicial. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984); see Lockhart v. Fretwell, 506 U.S. 364, 368-72, 113 S. Ct. 838, 842-44 (1993). In other words, a showing that counsel's performance falls below a reasonable standard is not enough; rather, the petitioner must also show that but for the substandard

performance, “the result of the proceeding would have been different.” Strickland, 466 U.S. at 694. The Strickland standard has been applied to the right of counsel under Article I, Section 9 of the Tennessee Constitution. State v. Melson, 772 S.W.2d 417, 419 n.2 (Tenn. 1989).

The petitioner must satisfy both prongs of the Strickland test to prevail on a claim of ineffective assistance of counsel. See Henley v. State, 960 S.W.2d 572, 580 (Tenn. 1997). The performance prong requires the petitioner to show that the counsel’s representation fell below an objective standard of reasonableness or “outside the wide range of professionally competent assistance.” Strickland, 466 U.S. at 690. The prejudice prong requires the petitioner to demonstrate that “there is a reasonable probability that, but for counsel’s professional errors, the result of the proceeding would have been different.” Id. at 694. “A reasonable probability means a probability sufficient to undermine confidence in the outcome.” Id. Failure to satisfy either prong results in the denial of relief. Id. at 697.

In Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975), our supreme court decided that attorneys should be held to the general standard of whether the services rendered were within the range of competence demanded of attorneys in criminal cases. Further, the court stated that the range of competence was to be measured by the duties and criteria set forth in Beasley v. United States, 491 F.2d 687, 696 (6th Cir. 1974), and United States v. DeCoster, 487 F.2d 1197, 1202-04 (D.C. Cir. 1973). Also, in reviewing counsel’s conduct, a “fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from the counsel’s perspective at the time.” Strickland, 466 U.S. at 689. Thus, the fact that a particular strategy or tactic failed or even hurt the defense does not, alone, support a claim of ineffective assistance. Deference is made to trial strategy or tactical choices if they are informed ones based upon adequate preparation. See DeCoster, 487 F.2d at 1201.

#### *Failure to Litigate Motion to Dismiss Based on Double Jeopardy*

The main contention in the petitioner’s ineffective assistance of counsel claim is that counsel failed to litigate his motion to dismiss the petitioner’s felony murder indictment based on double jeopardy. According to the petitioner, because he pled guilty to criminal trespass after the initial especially aggravated robbery charge, and because the subsequent especially aggravated robbery indictment was dismissed on double jeopardy grounds, he could not have been found guilty of felony murder because the state could not have proven the underlying felony. Or, as the petitioner argues in his brief, “[a] properly filed motion to dismiss early on by [counsel] would most definitely have resulted in the State having to dismiss the indictment and re-indict the [petitioner] on some other charge—if at all.” We disagree with the petitioner, and therefore we cannot grant relief on this claim.

First, we note that the petitioner's assertions that counsel did little to pursue the double jeopardy issue are without merit. At the post-conviction hearing, counsel testified that he spent a substantial amount of time researching the issue, even filing a motion to dismiss the felony murder indictment based on double jeopardy. That motion to dismiss was never heard, as the petitioner agreed to a guilty plea before the motion could be heard. At the post-conviction hearing, counsel testified:

I thought [double jeopardy] was a significant question. My concern was—here is where I was reading the case law. I knew he could not be convicted of the robbery or an aggravated robbery because that charge had been dismissed already. My question was could the State put on proof of that robbery for the purpose of proving the felony murder. And I could not find a case that gave me any real clear direction in Tennessee. Obviously, I wanted to make that argument and did make that argument in my brief that supported the motion to dismiss or the plea of double jeopardy. But [I] didn't know where that was going to go either at the trial level nor did I know where it was going to go at the appeal level.

Furthermore, counsel stated that he filed the motion to dismiss in an attempt “to get the D.A.’s office talking to me about a lesser charge,” which the state ultimately did.

Additionally, the petitioner's assertion that the hearing on the motion to dismiss would “most definitely have resulted in the State having to dismiss the indictment and re-indict” is inaccurate. To obtain a conviction for first degree felony murder in this case, the state would have been required to prove, beyond a reasonable doubt, the “killing of another committed in the perpetration of or attempt to perpetrate any . . . robbery[.]” Tenn. Code Ann. § 39-13-202(a)(2) (2003). The felony murder statute does not require that a defendant who is charged with first degree felony murder also be charged in a separate count of the indictment with the attempt or perpetration of the underlying felony, and this court has observed “that a felony murder indictment must allege that the killing was committed during the perpetration of a felony, but specific allegations of the elements and facts of the underlying felony are unnecessary.” State v. Alfonso E. Anderson, No. W2000-00737-CCA-R3-CO, 2002 WL 1558491, at \*2 (Tenn. Crim. App. at Jackson, Jan. 9, 2002) (citing State v. Jimmy Wayne Baker, No. M1999-00454-CCA-R3-CD, 2001 WL 252082, at \*10-11 (Tenn. Crim. App. at Nashville, Mar. 14, 2001)). Ultimately, to obtain a conviction for felony murder, the state must *prove* the underlying felony, not *convict* the defendant of the robbery. The petitioner mistakenly argues that a double jeopardy bar to convicting him of robbery prohibits the state from offering evidence of the robbery to support a felony murder conviction. In light of these holdings and of our review of the record, we conclude that the petitioner has not shown by clear and convincing evidence that counsel's failure to litigate the motion to dismiss was prejudicial. Therefore, the petitioner is not entitled to relief on this issue.

#### *Failure to Investigate Cause and Manner of Victim's Death*

The petitioner claims that counsel failed to investigate the petitioner's claim that he was not responsible for his uncle's death. No autopsy was performed on the victim, and the victim's death certificate listed his manner of death as "natural." In his brief, the petitioner argues, "counsel should have and should have requested an exhumation of the body and ha[d] an autopsy performed. . . . having an autopsy report in hand would have given both the State and the defense an opportunity to negotiate from an informed viewpoint." However, the petitioner has presented no proof, either in his petition, at the post-conviction hearing, or on appeal, supporting his claim that an autopsy would have established an intervening cause theory by clear and convincing evidence. Furthermore, while counsel testified that he did not speak to the victim's attending physician, he did speak to the victim's supervisory nurse and reviewed the victim's medical files, concluding that the victim's primary cause of death, aspiration pneumonia, was directly attributable to the head injuries allegedly inflicted by the petitioner. In light of the evidence, we conclude that the petitioner has failed to show by clear and convincing evidence how counsel's supposed failure to investigate the cause of death has prejudiced him. As such, the petitioner is not entitled to relief on this issue

#### *Failure to Consult Adequately*

The petitioner also claims that counsel's performance was constitutionally deficient because counsel did not adequately consult with him. At the post-conviction hearing, however, the petitioner failed to introduce any evidence as to how his attorney's supposedly inadequate communication prejudiced his defense. For his part, counsel testified that he did spend a sufficient amount of time communicating with the petitioner and his family about the case and that he even spent time working with the petitioner on a property bond in an attempt to have his client released from jail—an activity for which counsel believed he was not appointed and could not bill the trial court. In light of the evidence, we conclude that the petitioner has failed to prove prejudice by clear and convincing evidence. As such, the petitioner is not entitled to relief on this issue.

#### UNKNOWNING AND INVOLUNTARY GUILTY PLEA

When evaluating the knowing and voluntary nature of a guilty plea, the United States Supreme Court has held that "[t]he standard was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." North Carolina v. Alford, 400 U.S. 25, 31, 91 S. Ct. 160, 164 (1970) (citations omitted). The court reviewing the voluntariness of a guilty plea must look to the totality of the circumstances. See State v. Turner, 919 S.W.2d 346, 353 (Tenn. Crim. App. 1995). The circumstances include

the relative intelligence of the defendant; the degree of his familiarity with criminal proceedings; whether he was represented by competent counsel and had the opportunity to confer with counsel about the options available to him; the extent of

advice from counsel and the court concerning the charges against him; and the reasons for his decision to plead guilty, including a desire to avoid a greater penalty that might result from a jury trial.

Blankenship v. State, 858 S.W.2d 897, 904 (Tenn. 1993) (citing Caudill v. Jago, 747 F.2d 1046, 1052 (6th Cir. 1984)). A plea resulting from ignorance, misunderstanding, coercion, inducement, or threats is not “voluntary.” Id.

In the instant case, the petitioner testified that his attorney told him that there was no way he would prevail either on the motion to dismiss or at trial. According to the petitioner, his attorney gave him an ultimatum: twelve years in prison if he took the deal, or life in prison if he did not. The petitioner claims that his attorney did not give him time to consider the deal or discuss it with his family or another attorney; according to the petitioner, “[counsel] said I got to let them know by three o’clock. I think his excuse was they’ve got to let the people know that’s been subpoenaed whether to be here for court Monday or not.”<sup>3</sup> The petitioner claims that the morning his guilty plea was entered, counsel talked to him briefly, explaining that the trial court had “dismissed all reasons for double jeopardy.” When asked why he did not object to the guilty plea at sentencing, the petitioner claims that his attorney told him not to speak.

However, the petitioner’s claims are adequately refuted by the state. Counsel testified that he explained the full implications of the guilty plea to the petitioner, explaining that he could not guarantee either a dismissal of the indictment or an acquittal, while the guilty plea would guarantee the petitioner a twelve-year sentence, from which the petitioner could be paroled within six years, or perhaps sooner in light of his pre-trial confinement. Counsel also testified that morning the plea was entered, he and the petitioner “met again and went through it literally page by page, line by line of the agreement. . . . I wanted to make sure he knew what he was agreeing to.”

The evidence that may be most damaging to the petitioner’s argument regarding the voluntariness of his guilty plea, though, is found in his prior testimony. At the guilty plea hearing, the petitioner indicated to the trial court that he fully understood the crime with which he was charged, that he knew he was pleading guilty to the offense, and that he fully understood the plea agreement. At the post-conviction hearing, the petitioner testified that he had voiced concerns about his guilty plea to “the captain of the jail”; however, no employee from the Roane County Jail testified in support of the petitioner’s claims. The evidence of record does not preponderate against the trial court’s findings, which support the conclusions reached. Thus, the petitioner has not established that he is entitled to relief on this issue.

---

<sup>3</sup> An examination of the state’s plea offer does indicate that the state required an answer by 3:00 p.m. Friday in light of “out of state professional witnesses who have to be considered.”



CONCLUSION

In consideration of the foregoing and the record as a whole, we conclude that the trial court properly denied the petition for post-conviction relief. Therefore, the judgment of the trial court is affirmed.

---

D. KELLY THOMAS, JR., JUDGE